Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Qwest Communications International Inc.	)	WC 02-89
	)	
	)	
Petition for Declaratory Ruling On the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)	)	

COMMENTS OF NEW EDGE NETWORK, INC.
D/B/A NEW EDGE NETWORKS

New Edge Network, Inc. ("New Edge Networks")[1] respectfully submits these comments in response to Qwest Communications International Inc.'s ("Qwest") Petition for Declaratory Ruling ("Petition") requesting that the Federal Communications Commission ("Commission") specify which types of negotiated contractual arrangements between incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs") are subject to the mandatory

[1] New Edge Networks provides digital subscriber line ("DSL") and enhanced data communications nationally in small and midsize cities where populations generally range from 5,000 to 250,000. The company's DSL service is available in more than 360 small and midsize cities in 29 states. New Edge Networks also owns and operates a national data communications network with 18 regional hubs and almost 600 nodes, making it one of the largest asynchronous transfer mode ("ATM") networks in the United States. New Edge Networks provides competitive DSL, ATM and frame relay services through a combination of its own facilities (multi-service platform switches collocated in central offices), unbundled network elements, tariffed services and resale. As such, New Edge Networks is dependent upon the resale and unbundling obligations contained in the 96 Act to deliver competitive advanced services to retail and wholesale customers.

filing and 90-day state commission pre-approval requirements of section 252(a)(1) of the Telecommunications Act of 1996 (the "Act" or "96 Act"). New Edge Networks believes that the Commission should deny Qwest's Petition and allow state commissions the right to pursue their investigations as to whether or not certain agreements should have been filed for approval pursuant to section 252 of the 96 Act.

I. INTRODUCTION

At issue in this proceeding is whether or not the Commission is willing and able to clearly define what is considered an interconnection agreement related issue or service and therefore subject to filing for approval at the state commission. The issue of what is required to be filed is of great importance to New Edge Networks because once an agreement, or portion thereof, is approved by a state commission it is subject to the opt-in provisions contained in section 252(i) of the 96 Act.[2] The issue is also of great importance to Qwest because the company is facing increasingly greater regulatory scrutiny at state commissions for having not filed a significant number of agreements between itself and various competitive providers.

In its Petition, Qwest states that its primary goal is to resolve uncertainty and multiple proceedings and inconsistent results regarding the scope of the section 252(a) prior approval requirement.[3] The Petition is also replete with Qwest statements regarding how competitive providers will benefit if the Commission endorses Qwest's Petition. According to Qwest, competitive providers will benefit from lower administrative costs, greater operational flexibility in contracting with ILECs, faster implementation of new arrangements, and the ability to craft solutions and be responsive to the specific needs of a

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[2] Section 252(i) states that a local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

[3] Qwest Petition, pg. 6.

competitive provider.[4] New Edge Networks asserts that the number of competitive providers filing comments supporting Qwest's Petition will be provide a better indication of whether or not competitive providers agree with Qwest's assertions regarding the benefits to competitive providers.

Furthermore, New Edge Networks believes that a more plausible and honest explanation for Qwest's Petition is that the company is trying to preempt state commissions from investigating whether or not Qwest has violated section 252(a)(1) of the 96 Act. Qwest has put itself in a difficult regulatory position and is asking the Commission to bail it out. Should a state commission conclude that Qwest should have filed certain agreements, but did not, the state commission and the Federal Communications Commission could also conclude that Qwest has not provided nondiscriminatory access to network elements in accordance sections 251(c)(3) and 252(d)(1) of the 96 Act. Such a result could significantly hinder Qwest's chances of receiving 271 approval for the provisioning of interLATA services within its region. It is New Edge Network's belief, therefore, that Qwest is not seeking a declaratory ruling from the Commission for the benefit of competitive providers, but to ensure that its long distance applications will not be jeopardized if a state commission concludes that Qwest failed to file certain agreements with the appropriate state commission.

II. WHAT IS NECESSARY TO BE FILED FOR APPROVAL

In its Petition, Qwest suggests that the only aspects of a voluntary agreement that require filing for approval at the state commission are the schedule of itemized charges and related service descriptions.[5] Accordingly, aspects of the voluntary agreement that need not be filed include escalation clauses, dispute resolution provisions, administrative arrangements regarding the mechanics of provisioning, billing and other activities between the ILEC and CLEC, arrangements for contacts between the parties and non-binding standards and

[4] Qwest Petition, pgs. 7, 9, 17, 19, 21, 22, 23 and 24.
[5] Qwest Petition, pg. 6.

statements of expectations regarding service quality or performance.[6] Qwest is careful to point out in its Petition that the question is what ILEC-CLEC contract terms require prior approval before taking effect, not what terms are lawful in and of themselves.[7]

The reason Qwest makes this distinction is clear. Rather than file the agreements as part of the record in this proceeding and have the Commission address the lawfulness of the specific agreements, Qwest is asking the Commission to simply declare that the 96 Act requires only the schedule of itemized charges and related service descriptions to be filed for approval at a state commission. If the Commission were to endorse Qwest's Petition, it would practically absolve Qwest of any wrong doing regarding the company's concerted effort not to file numerous voluntary agreements.[8]

Qwest also states in its Petition, that the company demonstrated that none of the contractual provisions raised in the Minnesota Department of Commerce complaint are subject to the section 252(a)(1) filing and pre-approval process.[9] Qwest's statement is misleading and overly optimistic as to what conclusions the Minnesota Public Utilities Commission will ultimately reach since it's New Edge Networks' understanding that the Minnesota Public Utilities Commission has not made a final ruling in the proceeding.

It is important that the Commission have an understanding as to some of the agreements in question and the associated contractual terms that Qwest believes should not be subject to review pursuant to section 252(a)(1). As such, New Edge Network will present two examples for the Commission's edification. The first example illustrates how Qwest characterizes as a dispute resolution issue a fundamental change in the rates and charges that a competitive provider pays to Qwest for unbundled network elements and other services. The second example

[6] Qwest Petition, pg. 31.
[7] Qwest Petition, pg. 15.
[8] Even under Qwest's proposal to narrowly define what must be filed for approval at a state commission, New Edge Networks believes that Qwest would still be in violation of section 251(a)(1) of the 96 Act based on the fact that Qwest entered into a non-filed agreement with Eschelon that resulted in Eschelon paying to Qwest rates that are different than the rates filed for approval at the state commission.

illustrates why state commissions may reject a contractual term if it is not in the public interest.

The first example is an agreement between Eschelon and Qwest whereby Eschelon shall provide to Qwest consulting and network-related services, including but not limited to processes and procedures relating to wholesale service quality for local exchange service. In consideration of Eschelon's agreement to provide consulting services, Qwest agrees to pay Eschelon an amount that is ten percent (10%) of the aggregate billed charges for all purchases made by Eschelon from Qwest from November 15, 2000 through December 31, 2005.[10]

Apparently, Qwest believes that this type of agreement need not be filed for approval at the state commissions because it purports to address a dispute as to when Eschelon was eligible to provide services through the unbundled network element platform. However, New Edge Networks asserts that the terms in the agreement directly impact the rates paid by Eschelon to Qwest for all services, including unbundled network elements and tariffed services. As a result of the agreement, Eschelon is paying Qwest 10% less than New Edge Networks for unbundled network elements, resold and tariffed services. Clearly, this agreement affects more than a service dispute as to when Eschelon was eligible to provide services through the unbundled network element platform. Because the agreement directly impacts the rates paid by Eschelon to Qwest for all services, including unbundled network elements, it clearly should have been filed for approval at the appropriate state commission. New Edge Networks believes that Qwest did not file this agreement for commission approval because it did not want other carriers to opt into a similar arrangement.

Furthermore, New Edge Networks believes that this type of arrangement indicates how easily an ILEC could discriminate against CLECs if the Commission grants Qwest's Petition. Qwest could file a rate schedule for approval by the state commission and then negotiate a separate agreement that

[9] Qwest Petition, pg. 20.

effectively discounts the rates ultimately paid by a competitive provider. Thus, rate schedules submitted to a state commission for approval would be essentially meaningless. Just as Qwest's tariffed rates are meaningless if the company is free to negotiate a separate agreement that discounts the final price paid for tariffed services.

The real-life example above addresses how Qwest has effectively price discriminated against other competitive providers by not filing for approval its agreement with Eschelon. Because the agreement was not filed, New Edge Networks could not opt into a similar arrangement. Other types of discrimination could also occur if the Commission endorses Qwest's Petition. For example, what would preclude Qwest from offering shorter provisioning intervals to a competitive provider if service intervals do not qualify as a rate schedule or description of the service?

Discrimination is just one factor the state commission must address when reviewing an interconnection agreement. Another factor that state commissions must address is whether or not the agreement, or terms within the agreement, is consistent with the public interest, convenience, and necessity.[11] There are no set rules defining whether or not a contract term is in the "public interest" and New Edge Networks will not attempt to define what constitutes being in the public interest in these comments. However, it does seem evident to New Edge Networks that Congress would not have included a public interest standard if it intended the review process to be limited to rate schedules and service descriptions.

An example of a contractual arrangement that raises the public interest question, but was not filed by Qwest for review by a state commission, is the arrangement whereby competitive providers are granted favorable rates, terms and conditions in exchange for remaining silent in regulatory proceedings. A specific real-life example from the Minnesota case is an agreement between Qwest and Eschelon whereby Eschelon agrees to not oppose Qwest's efforts regarding

[10] Confidential Amendment to Confidential Trade Secret Stipulation between Eschelon Telecom, Inc. and Qwest Corporation.

Section 271 approval or to file complaints before any regulatory body concerning issues arising out of the party's interconnection agreements.[12] Granting Qwest's Petition would prohibit a state commission from making a determination as to whether such contractual arrangement is in the public interest.

Finally, Qwest states in its Petition "the mere fact that a PUC does not review a contract term in advance does not foreclose it from so later. Nor does it prevent other CLECs from requesting similar arrangements."[13] These are specious comments in defense of Qwest's proposal. First, if the contract term is never filed for approval the state commission has no way of reviewing the contract term other than through a formal investigation. Ironically, formal investigations such as those conducted by the Minnesota Department of Commerce are exactly what prompted Qwest to file this Petition in the first place and presumably what it wants to avoid in the future. Moreover, formal investigations are costly and time consuming. Second, while competitive providers are not prevented from requesting similar arrangements from Qwest, they will have no knowledge of the arrangements between Qwest and another carrier because all information will be confidential. Third, there is no guarantee that Qwest will agree to provide a similar arrangement to another carrier. If the agreement is not filed and approved by a state commission, it is not available for adoption subject to the opt-in provisions of section 252(i) of the 96 Act. As such, Qwest does not have to grant a similar arrangement to the requesting competitive provider.[14] Although Qwest emphasizes that it is not trying to reduce a competitive providers "pick and choose" rights in any respect,[15] that would be exactly the effect of limiting the filing requirements to a rate schedule and associated service descriptions as Qwest recommends.

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[11] Section 252(e)(2)(A)(ii).
[12] Confidential Agreement between Qwest and Eschelon Telecom, Inc. dated November 15, 2000, page 1.
[13] Qwest Petition, page 5.
[14] The Commission must understand that just because a competitive provider requests an arrangement from an ILEC does not mean that the ILEC will agree to the arrangement
[15] Qwest Petition, page 16.

III. CONCLUSION

The Commission should deny Qwest's Petition requesting that the Commission narrowly define what type of arrangements are subject to the filing requirements contained in the 96 Act. Limiting state commission review to rate schedules and service descriptions would render the state commissions' approval process practically meaningless. Especially if Qwest is allowed to enter into separate, non-filed agreements with competitive providers that result in rates actually paid by a competitive provider that deviate from the filed rate schedule. In order to prevent discriminatory behavior by the ILECs, more, not less, transparency is required.

Respectfully Submitted,

New Edge Network, Inc.
3000 Columbia House Blvd., Suite 106
Vancouver, WA 98661

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